BACHY SOLETANCHE (MALAYSIA) SDN BHD

v.

KIN HUP SENG CONSTRUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-132-1999]
20 NOVEMBER 2000

CIVIL PROCEDURE: *Summary judgment - Appeal against - Triable issues - Whether a fit and proper case for summary judgment - Consultant's certificate of practical completion - Whether valid and final - Whether building contract fulfilled - Rules of the High Court 1980, O. 14*

CIVIL PROCEDURE: *Summary judgment - Equity - Whether equitable principles applicable in O. 14 application - Rules of the High Court 1980, O. 14 - He who seeks equity must come with clean hands - Estoppel*

The senior assistant registrar ('SAR') allowed the plaintiff's application under O. 14 of the Rules of the High Court 1980 ('RHC'). Summary judgment was then entered against the defendant for the sum of RM1,230,290.91. Hence this notice of appeal to the judge in chambers against the said decision.

The main arguments raised by the defendant were: (i) the validity of the certificate of final completion; (ii) that the retention sum was not due and forthcoming; (iii) that the plaintiff did not come to court with clean hands; (iv) the issue of performance guarantee; and (v) whether the defendant was entitled to deduct the moneys that were due to the plaintiff for liquidated and ascertained damages ('LAD').

Held:

[1] The defendant had agreed that the works under the written agreement were completed. The said agreement spoke of the consultant's authority which could not be challenged since both parties had agreed to it. As such, the final certificate or certificate of practical completion should be accepted as final and conclusive by both parties.

[1a] Prior to this, the defendant had made an application to stay all proceedings for the purpose of referring the matter to arbitration. The application was rejected and the defendant did not appeal against that decision. Therefore, the conclusiveness of the final certificate could not be doubted.

[2] There was only one certificate of practical completion. From the available evidence, the consultant's certificate of completion was issued solely for the purpose of the written agreement. Therefore, it was incorrect for the defendant to argue that the certificate was a mere letter emanating from the consultant to the plaintiff.

[3] There were several letters between the consultant and the plaintiff regarding the payment of the retention sum. This could mean that the defendant had known all along in its dealings that the retention sum was due.

[4] The defendant had erroneously contended that the plaintiff came to court with unclean hands and as such should not be treated with equitable principles. Order 14 r. 1 of the RHC clearly excludes equitable principles in adjudicating an application for summary judgment under the said order. Notwithstanding this, the documentary evidence available showed that the plaintiff had come to court with clean hands.

[Appeal dismissed with costs.]

Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***
Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2 ***(refd)***
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(foll)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***
Cadman v. Horner [1810] 18 Ves 10 ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(foll)***
Davis v. Duke of Marlborough [1819] 2 Swan 108 ***(refd)***
Ebrahimi v. Westbourne Galleries Ltd [1973] AC 360 ***(refd)***
Ellis Mechanical Services Ltd v. Wates Construction Ltd [1978] 1 Lloyd's Law Reports 33 ***(foll)***
Fitzroy v. Gwillim [1786] 1 Term Rep 153 ***(refd)***
Harnett v. Yielding [1805] 2 Sch & Lef 549 ***(refd)***
Hopgood v. Brown [1955] 1 All ER 550 ***(refd)***
Invar Realty Pte Ltd v. JDC Corporation [1988] 2 CLJ 140 ***(refd)***
Jones v. Lenthal [1669] 1 Cas Ch 154 ***(refd)***
KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 ***(refd)***
Lec Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 ***(refd)***
Lee Kam Chun v. Syarikat Kukuh Maju Sdn Bhd [1988] 1 CLJ 52 ***(refd)***
Lord Dudley & Ward v. Lady Dudley [1705] Prec Ch 241 ***(refd)***
Loughran v. Loughran [1934] 292 US 216 ***(refd)***
Moorgate Mercantile Co Ltd v. Twitchings [1975] 3 All ER 314 ***(refd)***
Nail v. Punter [1832] 5 Sim 555 ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238 ***(refd)***

Rich v. Sydenham [1671] 1 Cas Ch 202 ***(refd)***
Shen Yuan Pai v. Dato' Wee Hood Teck & Ors [1976] 1 MLJ 16 ***(foll)***
Small v. Brackley [1707] 2 Vern 602 ***(refd)***
Thomas v. Porter [1668] 1 Cas Ch 95 ***(refd)***
Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 ***(refd)***
Viscount Clermont v. Tasburgh [1819] 1 Jac & W 112 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 1

Other source(s) referred to:
Equity and Law: A Comparative Study, Herman, Ralph A, p 11
Halsbury's Laws of England, 1999, vol 3, p 71

For the plaintiff - Ng Thiam Soon; M/s TS Ng & Co
For the defendant - S Ashokvijay (Ashley Lim & Partners with him); M/s Manjit Singh Sachdev, Mohammad Radzi & Partners

Reported by Raja Vishnu

JUDGMENT

Abdul Malik Ishak J:

Introduction

On 22 February 2000, the hard working and learned senior assistant registrar by the name of Puan Hajjah Wan Azizon binti Ahmad (hereinafter referred to as the "SAR") allowed with costs the plaintiff's application under O. 14 of the Rules of the High Court 1980 ("RHC") by way of a summons in chambers in encl. 13 for summary judgment to be entered against the defendant for the sum of RM1,230,290.91 together with interest on the said sum at 8% per annum from the date of judgment until full settlement. Aggrieved by the decision of the SAR, the defendant filed a notice of appeal to the judge in chambers on 24 February 2000 as seen in encl. 22.

The following three outstanding authorities will be used as guidelines in adjudicating encl. 22.

Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) in *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 FC, in fine language explained an O. 14 application at p. 284 of the report in this way:

> That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the RSC Order 14 procedure.

and this particular passage rings true even today and it can be applied vigorously to the factual matrix of the present case.

In *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400, Mohamed Azmi SCJ delivering the majority decision had this to say of an O. 14 application (at p. 408 of the report):

> In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 had this to say at p. 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (*See Cow v. Casey* [1949] 1 All ER 197 and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 at p. 516).

A robust approach was advocated by Lord Justice Lawton in *Ellis Mechanical Services Ltd v. Wates Construction Ltd* [1978] 1 Lloyd's Law Reports 33 CA when his Lordship said at p. 36 of the report:

> If the main contractor can turn round, as the main contractor has done in this case, and say 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties; he is deprived of his commercial lifeblood. It seems to me that the administration of justice in our Courts should do all it can to restore that lifeblood as quickly as possible. One of the demerits of our system of justice is that in this class of case, because of our rules of procedure, an arbitration under a building contract of this size is likely to take years. For example, Mr. Keating said that the defendants would be entitled to have discovery of all the documents. Indeed they would. He said that they would be entitled to examine them and see what they could find from them; indeed they would. That would take a very long time and the delay might do injustice to the plaintiffs.
>
> The Courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases, because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the Courts make a robust approach, as the Master did in this case, to the jurisdiction under O. 14.

I will now proceed to examine the facts of the present appeal.

Factual Matrix

By way of a written agreement dated 5 February 1996 entered into between the plaintiff on the one part with that of the defendant on the other part for the "construction of diaphragm wall and barrette pile footings including steel plunge in column to enable the top down construction of the pacific treasure hotel and office tower comprising six basements, six podium levels and twin twenty one storey towers all as per attached drawings" for the contract sum of RM15,125,142 as reflected in the written agreement marked as "JCS-1" of encl. 12 with particular reference to cl. 1.1 (q) in Annexure "B". According to cl. 1.1 (g) of Annexure 'B' to the written agreement, the date for possession of the site was said to be on 26 January 1996 while under cl. 1.1 (i) thereof the date for practical completion of the works was said to be on 3 July 1996. According to cl. 1.1 (j) of Annexure "B" to the written agreement, the defect liability period was computed at 12 months. The defendant by way of an affidavit in reply in para 5 of encl. 14 agreed as to the description of the works which the plaintiff contracted to perform.

The works were completed by the plaintiff and the certificate of practical completion dated 11 October 1996 was issued by the project consultant by the name of Robert Bird & Associates Sdn Bhd (hereinafter referred to as the "consultant"). Thereafter by letter dated 15 October 1996, the consultant had given a clear notice to the defendant to examine and verify the completed works so that both parties could agree on the final amount of work done by the plaintiff. It would be pertinent to mention that both the certificate of practical completion dated 11 October 1996 that was issued by the consultant and the letter dated 15 October 1996 that was issued by the same consultant were collectively exhibited and marked as exh. "JCS-2" of encl. 12. At the time of the issuance of the certificate of practical completion its validity was not doubted at all by the defendant. The letter from the consultant dated 15 October 1996 was addressed to the defendant and it was worded as follows:

> 15 October 1996
>
> RE: THE PROPOSED HOTEL AND OFFICE ON LOTS 326, 904, P.T. 72 & P.T. 336, JALAN CHANGKAT THAMBI DOLLAH, OFF JALAN PUDU, KUALA LUMPUR FOR EMPIRE LEGACY SDN BHD
>
> – Interim Claim No. 8
>
> We have now received interim claim No. 8 submitted on practical completion by Bachy Soletanche Sdn Bhd, and note that this was copied to your goodself. Please ensure that these quantities are verified, inclusive of variations, and that schedules are prepared for evaluation. We will call a meeting that will include Empire Legacy, Zaindun Leong, Kin Hup Seng, Bachy and ourselves prior to the issue of the next payment certificate, at which the parties to the contract will need to agree and sign off on the final as built quantities.

and in essence this letter showed that it was clear in the consultant's mind that practical completion was already achieved when this letter was issued. But somehow the defendant had a change of heart and the defendant now disputed the certificate of practical completion dated 11 October 1996 and this was made clear by the defendant in para. 6 of the defendant's affidavit in reply in encl. 14.

According to cl. 1.1 (L) of Annexure "A" to the written agreement, the words "practical completion" has been defined to mean:

> the stage in the execution of the works when:
>
> (i) the works are complete except for minor omissions and minor defects:
>
> (A) which do not prevent the works from being reasonably capable of being used for their intended purpose; and
>
> (B) the rectification of which will not prejudice the convenient use of the works.

And according to cl. 1.1 (j) of Annexure "A" to the written agreement, the phrase "defects liability period" means "that period referred to in Annexure 'B' following the date of practical completion." As alluded to earlier, the defect liability period was for a span of 12 months and it should follow the date of practical completion and that would be 10 October 1997.

The consultant issued the list of defective works during the defect liability period and this was contained in the certificate of practical completion as seen in exh. "JCS-2" of encl. 12. The plaintiff went about dutifully to rectify all the defective works as listed by the consultant and rectification was completed on 28 May 1997. There was a letter from the plaintiff to the consultant dated 28 May 1997 and this letter clearly showed beyond peradventure that rectification to the defective works had been undertaken successfully by the plaintiff. The letter from the plaintiff to the consultant dated 28 May 1997 was exhibited in encl. 17 which was an affidavit in reply of the plaintiff and that letter was marked as exh. "JCR-1", and it was worded as follows:

> THE PROPOSED HOTEL AND OFFICE ON LOTS 326, 904, P.T. 72 & P.T. 336, JALAN CHANGKAT THAMBI DOLLAH, OFF JALAN PUDU, KUALA LUMPUR FOR EMPIRE LEGACY SDN BHD
>
> - Defects Maintenance Liability
>
> ---
>
> We refer to your letter dated 11 October 1996 in which you certified practical completion of the works and to our recent discussions with your Mr Russel V Viloria.
>
> We wish to record that until now we have carried out all remedial and outstanding works that have been asked of us.
>
> Please note that should the need arise for us to proceed with additional remedials (item 12 of your letter), the proprietor and yourselves should comply with clause 19 of the Conditions of Engagement and notify us with a few days notice. We trust you have (done) so to date and that no defects have been discovered.

There was no reply to this letter. The consultant remained silent. In the circumstances, it would be safe to assume that the consultant was satisfied and did not issue any other instructions in regard to the defective works for the plaintiff to rectify within the defect liability period.

An event worth mentioning would be this. On 31 January 1997, both the plaintiff and the defendant together with the consultant held a meeting. That was indeed a successful meeting. In that meeting both the plaintiff and the defendant had agreed that the total amount for completed works was RM16,403,878.86. The liquidated damages was computed at RM600,000 and

it was agreed that the defendant be allowed to deduct from the outstanding sum. An amount due and payable to the plaintiff was computed at RM2,729,945.82. This was followed by an amount owing but allowed to be retained by the defendant to the tune of RM1,230,290.91 which must be settled by the defendant by monthly progressive payments commencing from the month of March 1997 and ending in the month of October 1997. All these assertions by the plaintiff in its affidavit in encl. 12 at paras. 6 and 10 thereof remained unchallenged by the defendant right up to this very day (*Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339; *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; and *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238) and due weight must be accorded to those assertions.

By way of a follow up to the meeting on 31 January 1997, the consultant had issued an interim payment certificate number 7 for the sum of RM2,729,945.82 which was subsequently honoured by the defendant and the final certificate – the statement of final account, for the sum of RM1,230,290.91; and these two documents were well documented and they were dated 24 February 1997 and collectively marked as exh. "JCS-2" of encl. 12. The fact that the statement of final account was indeed the final certificate can never be doubted because even the consultant described it as such when the consultant was referring to the statement of final account in its facsimile to the plaintiff dated 28 February 1997 and marked accordingly as exhibit "JCS-4" in encl. 12. Furthermore, at the time of the issuance of the statement of final account which referred to as the final certificate by the consultant, the defendant saw it fit to remain silent which conduct necessarily meant that it was not doubted by the defendant at all. It would be germane to emphasise that this fact remained unchallenged by the defendant.

Alluding to the meeting on 31 January 1997 where both the plaintiff and the defendant agreed that in the month of March 1997 and the subsequent months up to October 1997, the defendant was supposed to effect progressive payments towards the sum of RM1,230,290.91 as contained and described in the final certificate, which sum the plaintiff had reminded the consultant by way of a letter dated 5 March 1997 and the consultant had responded by issuing a payment certificate number 8 for the said purpose which was sent to the plaintiff accompanied by the consultant's cover letter dated 21 April 1997, and it would certainly be ideal to mention that the plaintiff's letter dated 5 March 1997, and the consultant payment certificate number 8 accompanied by the consultant's letter dated 21 April 1997 were all collectively marked as exh. "JCS-6" of encl. 12. But, the defendant was still dragging its feet and to date had not paid the plaintiff in accordance to the payment certificate number 8 for the sum of RM1,230,290.91 despite the expiry of the agreed retention period which was until October 1997. This was the attitude adopted by the defendant.

On 20 October 1997 after the expiry of the defect liability period, the solicitors for the plaintiff issued a letter demanding payment for the outstanding sum of RM1,230,290.91 as reflected in exh. "JCS-8" of encl. 12. Thereafter the defendant alleged that there were outstanding defective works which the plaintiff vehemently denied and this led to an exchange in correspondences between the parties as reflected in the following exhibits of the relevant enclosures:

(1) exhibit marked "A" was a letter dated 28 October 1998 from the defendant to the plaintiff which was annexed to an affidavit in reply of the defendant as seen in encl. 14;

(2) exhibit marked "JCR-3" was a letter dated 30 October 1998 from the plaintiff to the defendant which was annexed to an affidavit in reply of the plaintiff as seen in encl. 17;

(3) exhibit marked "E" was a letter dated 25 August 1999 from the defendant to the plaintiff which was annexed to an affidavit styled as the further affidavit of the defendant as seen in encl. 19; and

(4) exhibit marked "A-1" was a letter dated 27 August 1999 from the plaintiff to the defendant which was enclosed and annexed to the second affidavit in reply of the plaintiff as reflected in encl. 20.

In desperation the defendant alleged that there were defective works by exhibiting colour photographs marked as exh. "B" and labelled as "Basement 5, Column/Barrette" as reflected in encl. 14. The defendant too exhibited two documents marked as exh. "C" of encl. 14 which related to the "Hacking of Overcasted Diaphragm Wall and Barrette Piles". But alas, the colour photographs and the two documents were related to the works of "Hacking of Barrette Piles" which did not come within the scope of the plaintiff's works. The plaintiff had since denied these allegations of defective works in its affidavit in reply in encl. 17 especially at paras. 17 and 18 thereof. To play safe, the plaintiff proceeded one step ahead and had exhibited Annexure "E" relating to the Schedule of Rates which revolved on the "Bill of Quantities" mutually agreed between the parties and these documents were marked as exh. "JCR-4" of encl. 17.

A perusal of the mutually agreed "Bill of Quantities" in exh. "JCR-4" of encl. 17 would clearly show the following three items under the plaintiff's works as described in the written agreement:

(1) the construction of 800 mm thick diaphragm wall;

(2) foundation barrette piles; and

(3) plunge in columns,

and under the category of "foundation barrette piles" at sub-item 10, the words "Hacking top of barrette piles" appear and at the last column the words "By Others" appear. These brief recitals would clearly show that "Hacking top of barrette piles" did not come within the scope of the plaintiff's works. It was so clear that no one could possibly doubt it.

It must be recalled that the plaintiff had communicated with the respondent by letter dated 28 May 1997 in regard to the completion of the rectification of the defective works which letter had been reproduced in the early part of this judgment. There were no further instructions from the consultant in regard to other defective works that needed rectification. As far as the plaintiff was concerned, the scope of works that the plaintiff contracted to do had completed and by 28 May 1997 the defective works had been rectified and so the plaintiff submitted that the sum of RM1,230,290.91 together with interest thereto computed at 8% per annum from the date of judgment until full settlement should rightly go to them and it was for this reason that encl. 13 was filed. Mr. Ng Thiam Soon, learned counsel for the plaintiff, submitted that encl. 22 should be dismissed with costs. This brings to mind and put into sharp focus the speech of Lord Denning M.R. in *Ellis Mechanical Services Ltd v. Wates Construction Ltd (supra)* when his Lordship in fine language said at p. 35 of the report:

> That is all very well; but, as all of us with experience of building and construction cases are aware, there is inevitably something due. In most cases it can be said with certainty that x pound is due. In such a case the court gives judgment for the x pound and gives leave to defend as to the balance. Otherwise it would mean that the builders and contractors could be kept out of a great portion of their money indefinitely by the employers simply saying 'I want to investigate the accounts'. The employer could force the builder into bankruptcy by saying that he wants to sort out the accounts. So the Court does not allow a builder or contractor to be kept out of the whole of his money on such an excuse. It gives judgment for such sums as it is reasonably seen is due.

My attention was drawn to what had happened before the learned SAR. It was pointed out that on 15 November 1999 when the matter came up before the learned SAR, the defendant had sought for an adjournment of the hearing of encl. 13. After the adjournment, so the submission went, the defendant suspiciously produced an alleged copy of a letter of instruction from the consultant dated 25 November 1999 which letter the plaintiff had no knowledge of and it was submitted that the plaintiff too did not receive that letter. This controversial letter has since been enclosed and marked as exh. "F" in the defendant's further affidavit as seen in encl. 19. The controversial letter dated 25 November 1999 was from the consultant to the defendant and it was worded as follows:

RE: PROPOSED HOTEL AND OFFICE ON LOT 326, 904 P.T. 336 JALAN CHANGKAT THAMBI DOLLAH OFF JALAN PUDU, KUALA LUMPUR FOR M/S EMPIRE LEGACY SDN. BHD.

– DEFECTIVE WORKS

We write further to our letter to Bachy Soletanche (M) Sdn Bhd and the Resident Engineer's Site Instruction No. 3168 dated 25th Nov 1999.

You are hereby instructed to direct your subcontractor Bachy Soletanche (M) Sdn Bhd to rectify the defective works as highlighted in the site instruction No. 3168.

Thank you.

and it was accompanied by a handwritten memo of a sort from the consultant and addressed to the defendant and it was worded in this way:

Job: Hotel and office at Jalan Changkat Thamby Dollah. Job No: Nil

Contractor: Kin Hup Seng Const. S.B. Date: 25.11.99 Time: 8.30 am.

Attention: Mr. A. Jegatheeswaran Page: 1 of: Nil

ORIGINAL SITE INSTRUCTION No. 3168

Instructions: Outstanding Defects of Diaphragm Wall and M&E Penetration.

Letter dated 11/10/96 with regards to Practical Completion refers:-

The following matters requires your immediate attention:-

(1) Defects at diaphragm wall as per attached photographs.

(2) Blockout for M&E Penetration in Panel P 42 is still outstanding.

The above were part of the conditions for Practical Completion as mentioned in item 12 and 14 of the above mentioned letter.

Please make necessary arrangement(s) for your diaphragm wall contractor to visit and view the site and make good the defects as soon as possible.

c.c. Director of Robert Bird & Associates Sdn. Bhd – Mr. Don L.P. Yow

Sgd. (Illegible).	Approved by:
Henry Nang	Sgd. (Illegible).
25.11.99 8.55 a.m.	25/11/99 9.20 a.m.

The plaintiff had rectified the defective works on 28 May 1997 while the controversial letter together with the handwritten memo were dated 25 November 1999. There was a lapse of two years five months and 27 days before the controversial letter and the handwritten memo surfaced. Was this a scheme hatched by the defendant as an afterthought in order to prevent the plaintiff from pursuing successfully under an O. 14 application? The available evidence would support this conclusion. It was an irresistible conclusion. The plaintiff was most unhappy and by way of the second affidavit in reply in encl. 20 at para. 6 thereof it was categorically deposed that:

> The plaintiff has no knowledge of paragraph 6 of the defendant's further affidavit and asserts that the plaintiff did not receive the purported letter dated 25.11.99 from Robert Bird & Associates Sdn Bhd ('the said consultant'). Further, I assert that the plaintiff did not receive any letters regarding the said contract and/or on the rectification works from the said consultant in the period of approximately 3 years and the existence of the letter dated 25.11.99 has surprised the plaintiff. Apart from that, I am advised by my solicitors and verily believe that the said consultant has been fully relieved from their duties under the said contract *(functus officio)* and any instructions given now especially the letter dated 25.11.99 is not valid since the Final Account Statement was issued on 24.2.97, that is exhibit "JCS 3" in the plaintiff's supporting affidavit on 14.8.99.

Now, the plaintiff's supporting affidavit affirmed on 14 August 1999 can be seen in encl. 12 and exh. "JCS-3" annexed thereto showed the "Statement of Final Account" which bore the figure of RM16,403,878.86. Incidentally, as alluded to earlier this figure comprised the total amount for the completed works.

An Appraisal Of The Facts With That Of The Law

It would be ideal to refer to cl. 16.3 of Annexure "A" to the written agreement as seen in exh. "JCS 1" of encl. 12 and it states in no uncertain terms that:

> Within fourteen (14) days after the Final Certificate has been issued, the proprietor (referring to the defendant) shall pay to the Builder (referring to the plaintiff) all amounts then payable.

and since the final certificate was dated 24 February 1997, as alluded to in the early part of this judgment, then calculation wise the undisputed debt of RM1,230,290.91 should be paid by 10 March 1997.

Documentary wise, the defendant agreed that the works under the written agreement had been completed and the following documents would bear out this assertion:

(a) interim payment certificate number 7 as seen in the last two pages of exh. "JCS-3" of encl. 12;

(b) payment voucher dated 2 May 1997 as reflected in exh. "JCS-5" of encl. 12; and an

(c) interim payment certificate number 8 as seen in the last two pages of exh. "JCS-6" of encl. 12.

Clause 7.1 of Annexure "A" to the written agreement speaks of the consultant's authority and it is an authority that cannot be challenged since both the parties had agreed to it. It reads as follows (see "JCS-1" of encl. 12):

> The Proprietor (referring to the defendant) and the Builder (referring to the plaintiff) agree that:
>
> (a) only the Project Consultant is hereby authorised to issue instructions to the Builder (referring to the plaintiff) in respect of any matter concerning the execution of the works or to amplify or clarify the contract documents;
>
> (b) the Project Consultant is hereby authorised to act as the assessor, valuer and certifier in respect of any matter concerning the execution and completion of the works where so required under this Agreement;
>
> (c) only the Project Consultant has the authority to issue any instructions which have or may have the effect of increasing in the contract sum whether by way of an instructions to carry out a variation or otherwise; and
>
> (d) only the Project Consultant has the authority to extend the date for practical completion.

The all pervading authority of the consultant gave mileage to the argument that the final certificate issued by the consultant should be accepted by both the parties as the gospel truth, after all, as the learned authors of *Halsbury's Laws of England*, vol. 3, 1999 edition once said at p. 71: "The effect of a final certificate will depend on the terms of the contract." In my judgment, once the final certificate was issued by the consultant, the written agreement must be treated as completed and the contract has come to an end. *Per se* the final certificate was final and conclusive and even the consultant cannot challenge it. Clause 13.7 of Annexure "A" to the written agreement states as follows:

> The Project Consultant may, by any certificate, correct any error which has been discovered in any previous certificate, or may modify any previous certificate, other than a Certificate of Practical Completion or the Final Certificate, which has been issued by him.

and it shows beyond per adventure the conclusiveness of the final certificate. The late BTH Lee J, in the context of the conclusiveness of the final certificate as issued by the architect, had this to say in *Shen Yuan Pai v. Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16, 19:

> On conclusiveness of a final certificate, *Halsbury's Laws of England*, vol. 4, 4th edn, p. 616 para. 1209 says:
>
> > Conclusiveness of a final certificate. Except in cases where there is an arbitration clause entitling an arbitrator to review the decisions of the architect as to the amount due or as to whether the works are in accordance with the contract, or where the architect is disqualified from certifying or where the certificate may otherwise be dispensed with, the final certificate will be conclusive.
>
> In my judgment the intention of the parties was expressed in terms by the Agreement that the satisfaction of the Architect was to be expressed in his final certificate which unless there has been a request for arbitration is conclusive evidence that the works had been properly carried out and completed in accordance with the terms of the contract.
>
> There really can be no matter of doubt that the Architect had by his letter dated August 21, 1968 so expressed his satisfaction to the defendants and I am accordingly of the opinion and I hold that the contractor is entitled to the amount claimed.

In *Usahabina v. Anuar bin Yahya* [1998] 2 CLJ Supp 131, Augustine Paul JC (now judge) at p. 153 of the report had this to say in regard to the conclusiveness of a final certificate:

> In *P & M Kaye Ltd v. Hosier & Dickinson Ltd* [1972] 1 All ER 121, followed in *Shen Yuan Pai v. Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16, the House of Lords considered the meaning of the words 'conclusive evidence in any proceedings arising out of this contract' in a similarly worded building contract clause and held that these words prevented any further legal action, including legal proceedings started long before the certificate was issued. It applies to arbitration and court proceedings. As to the time when the certificate becomes conclusive Lord Morris said at p. 127:
>
> > As by the terms of the agreement it was provided that disputes were to be referred to arbitration it was natural that cl 30(7) should deal with the situation where an arbitration was in train. A final certificate was then not to be conclusive evidence in the terms set out in cl 30(7). So if there was a written request to concur in the appointment of an arbitrator before a final certificate had been issued such final certificate would not be conclusive evidence. The contractors agree that the same result would follow if arbitration proceedings (though agreed on orally)

were actually in progress or had been agreed on. In practice if arbitration proceedings were in progress or were pending there would almost certainly have been some previous written request to concur in the appointment of an arbitrator.

But what is the position if there has been no reference to arbitration and no initiation of such a reference by the giving of a written request to concur in the appointment of an arbitrator? In that event unless words are to be written into cl 30(7) the position would be that a final certificate would be conclusive evidence (in the terms of cl 30(7)) in any proceedings whether by arbitration proceedings 'or otherwise'. The words 'or otherwise' must denote court proceedings. The only exception to this would be that the contractor (but only he) could deny to a final certificate the attribute of being conclusive evidence by writing within 14 days to request arbitration.

Thus the conclusiveness of a final certificate can be challenged only if a request for arbitration is sought within the period specified in cl 30(6) and (7). In that event the final certificate ceases to be final and may be re-opened for resolution.

In the present appeal, James Foong J had on 2 August 1999 rejected the defendant's application in encl. 6 to stay all proceedings for the purpose of referring the matter to arbitration and the defendant did not appeal against that decision and that being the case the conclusiveness of the final certificate issued by the consultant can never be doubted. In the context of cl. 13.7 of Annexure "A" to the written agreement, the validity of the certificate of practical completion and the final certificate were not in doubt at the time of its issuance. Even the mode of the payment of the balance sum of RM1,230,290.91 was agreed upon by the parties at the meeting on 31 January 1997; and at that meeting the method of the monthly progressive payments were devised where the defendant was supposed to commence payment from the month of March 1997 until the end of the month of October 1997. All these averments as stated earlier can be seen in paras. 8, 9 and 10 of the plaintiff's affidavit in encl. 12 and these paragraphs together with the documents exhibited thereto remained unchallenged by the defendant. Sad to say, the defendant did not dispute nor deny the averments of those paragraphs in encl. 12. By way of an analogy, the court in *Invar Realty Pte Ltd v. JDC Corporation* [1988] 3 MLJ 13 also laid emphasis on the binding effect of the mutual agreement of the parties in a meeting. At p. 14 of the report, Chao Hick Tin JC said:

In response to the architect's request, DC submitted on 7 January 1985 a revised master programme for completing the project. There was a site meeting on 9 January 1985 where this revised master programme was discussed and agreed upon. The minutes of that site meeting recorded that 'Invar and consultant confirmed acceptance of JDC's revised master programme'. At the next site meeting a week later, the minutes of the last meeting were confirmed and the following matter was also minuted:

a Invar and consultant requested that should actual progress of vertical tiles be faster than indicated in the master programme, they would be required to revise the programme to enforce early start of curtain wall, M&E and finishing works and eventually completion date. JDC confirmed agreement.

b On 31 January 1985, the architect wrote to JDC stating that by virtue of cl 23 of the contract, an extension of time was granted to JDC for a total period of 10 1/2 months from 15 April 1985 (the original completion date) which has been agreed on at the meeting held on 9 January 1985 between the owner, consultant and contractor.

c and he continued to say at p. 17 of the report:

The arbitrator in the instant case found that the extension of completion of 10 1/2 months was by mutual agreement of the parties. Granted that whether on certain given facts there is a binding agreement is a conclusion of law, I am inclined to take the view that the issues that were placed before the arbitrator
d upon which he made a finding were more questions of fact rather than questions of law. He was asked to determine whether the parties had agreed between them to extend the completion date by 10 1/2 months. The arbitrator answered the question in the affirmative after examining contemporaneous documents and hearing oral evidence from the parties. If I am right in this view, then there can be no appeal to the High Court.

e It would be ideal, at this juncture, to reproduce the relevant documents. Firstly, it would be the undisputed facsimile from the consultant dated 28 February 1997 as seen in exh. "JCS-4" of encl. 12 and it was worded as follows:

f **FACSIMILE TRANSMITTAL**

Company: BACHY SOLETANCHE

Attention: MR. Christophe Dauchy	From: Jeffrey Roulston
Project: PACIFIC TREASURE	Job No: (Illegible)
Date: 28/2/97 Fax No. 7179637	No. of Pages: 1

g Copies To: ...

CHRISTOPHE,

h FOR YOUR INFORMATION, INTERIM CERTIFICATE NO. 7 WILL BE READY THIS AFTERNOON. THE FINAL CERTIFICATE WAS WAITING FOR MDM YONG'S SIGNATURE YESTERDAY & WE SHOULD RECEIVE THIS TODAY. ALSO WILL CALL YOU LATER TODAY.

REGARDS,

i SGD: (ILLEGIBLE).

Secondly, it would be the letter from the consultant to the defendant dated 15 October 1996 (marked as the first exhibit in exh. "JCS-2" of encl. 12) which had been reproduced in the early part of this judgment and which was issued subsequent to the certificate of practical completion dated 11 October 1996 as reflected in the second exhibit in exh. "JCS-2" of encl. 12. Now, the certificate of practical completion dated 11 October 1996 from the consultant to the plaintiff was worded in this fashion:

THE PROPOSED HOTEL AND OFFICE ON LOTS 326, 904, P.T. 72 & P.T. 336, JALAN CHANGKAT THAMBI DOLLAH, OFF JALAN PUDU, KUALA LUMPUR FOR EMPIRE LEGACY SDN BHD – PRACTICAL COMPLETION

We refer to our letter dated 7 October 1996 regarding the above. We also refer to the following meeting and site inspection:

Date: 8 October 1996
Venue: Pacific Treasure Site
Present: Terry Huang
Don Teo
Christophe Dauchy
Olivier Rober
Nimal Perera
Geoff Hunt

We hereby certify practical completion of the works as stated in the above mentioned contract subject to the completion of the following in accordance with the agreed time schedule.

	WORK ITEM	COMPLETION DATES
1.	Panel P24 rectification works	15/10/98
2.	Shear Pinning of Diaphragm Wall Panels P24B/S, P25 & P26	28/10/96
3.	Complete Rock Probing of necessary Barrettes	25/10/96
4.	Grouting of Rock Probing cores	25/10/96
5.	Complete the hacking of overcast concrete for the diaphragm wall	7 days after removal of guide wall by KHS
6.	Core testing of Diaphragm Wall Panels	Mutually agreed dates with KHS as excavation allows

7.	Core testing of Barrettes (if required based on RBA assessment at future date)	Mutually agreed dates with KHS
8.	Grouting of test cores	Within 1 week of core testing
9.	Cutting off Plunge-in Column Extensions	On completion of excavation to RL 38.1 m by KHS
10.	Hoarding to be restored to original condition	25/10/96
11.	External Drain to be cleaned and handed over to satisfaction of KHS	25/10/96
12.	Rectification of Defects	As and when discovered during the excavation of basement construction period. Timing to be agreed with KHS
13.	As Built surveys - Plunge-in Columns	Within 3 days of completion of excavation of RL 38.1m by KHS
	- Diaphragm wall Panels	Within 2 weeks after top of Diaphragm Wall exposed
	- Barrettes	Mutually agreed dates with KHS following excavation
14.	Construction of M & E penetration in Panel P42 for which a Blockout was not provided following notification of its requirement	Mutually agreed dates with KHS as excavation allows
15.	Removal of Bachy Equipment	Immediately following the completion of the works for which they are needed

Your attention to the above and co-operation in completing the works within the specified time schedule is appreciated.

Any further clarification should be requested in writing.

Yours faithfully.

Sgd. (Illegible).
JEFFREY ROULSTON

Project Consultant
Robert Bird & Associates Sdn Bhd

Empire Legacy – Mr Terry Huang
Kin Hup Seng – Mr Russel Viloria
Resident Engineer – Mr Geoff Hunt
Zaidun Leong – Madam Tan.

and what the consultant had in mind was that practical completion had been achieved. Both Mr. S. Ashokvijay and Miss Ashley Lim for the defendant contended that the certificate of practical completion dated 11 October 1996 as worded was not a final certificate but rather it was couched as a mere letter emanating from the consultant to the plaintiff. But according to cl. 1.1(i) of Annexure "A" to the written agreement, "the Date for Practical Completion" means the date on or before which the Builder (referring to the plaintiff) is to bring the Works to Practical Completion, being the date set out in Annexure "B" subject to adjustment as provided for in cl. 12 of these Conditions of Engagement" and when read with cl. 1.1(L) of Annexure "A" to the written agreement as reproduced in the early part of this judgment, the concept of dichotomy of certificates in respect of practical completion as envisaged by the defendant must fall flat to the ground. It was wrong and incorrect to argue that the certificate of practical completion dated 11 October 1996 was not a final certificate but rather a mere letter tainted with conditional practical completion. From the relevant clauses in the written agreement, there was only one certificate of practical completion and the available evidence clearly showed that the certificate of practical completion dated 11 October 1996 was solely issued for the purpose of the written contract and nothing else. Even the late BTH Lee J, in *Shen Yuan Pai v. Dato Wee Hood Teck & Ors (supra)* rejected the argument that the certificate by the architect which was not in a specified form but rather in the form of a letter was not a certificate within the meaning of cl. 39 of the contract in that case. His Lordship, the late BTH Lee J, in that case at p. 19 of the report aptly said:

> As no form is prescribed, it is in my view for the Architect to determine the form and nature of certificate as he may think fit.

and the consultant in the present appeal was, likewise, free to choose the mode of issuing the certificate of practical completion as no standard format was formulated by and under the written agreement.

Next, an argument was advanced for the defendant to the effect that the retention sum of RM1,230,290.91 was not due and forthcoming. This was an argument that was totally unsupported by the available evidence. I will now proceed to highlight certain facts that will show the falsity of the defendant's arguments. The letter dated 5 March 1997 from the plaintiff to the consultant

reminded the latter of the monthly progressive release for the sum of RM1,230,290.91 and this letter was worded as follows (see exh. "JCS-6" of encl. 12):

> PACIFIC TREASURE HOTEL/OFFICE(TOWER) PROJECT AT LOTS 326, 904, PT.72, PT.73, PT.336, JALAN CHANGKAT THAMBI DOLLAH, OFF JALAN PUDU, SECTION 52 AND 56, KUALA LUMPUR FOR EMPIRE LEGACY SDN BHD
>
> - Statement of Final Account
>
> We are pleased to return herewith two (2) copies of the Statement of Final Account duly signed for your further action.
>
> Please note that, as agreed on 31/01/1997 by both parties, 2/3 of the 7.5% retention should be released on monthly basis commencing from March 1997 up to October 1997. The remaining amount being paid at the end of Defect Liability Period i.e. October 1997.
>
> We trust the above is in order.

and this was followed by the consultant's letter dated 21 April 1997 (see exh. "JCS-6" of encl. 12) which enclosed the payment certificate number 8 dated 10 April 1997 for the release of the retention money for the month of March 1997 pursuant to the mutual agreement dated 31 January 1997 as alluded to in the early part of this judgment. The consultant's letter dated 21 April 1997 was worded in this way:

> RE: PACIFIC TREASURE HOTEL/OFFICE(TOWER) PROJECT AT LOTS 326, 904, PT.72 PT.73, PT.336, JALAN CHANGKAT THAMBI DOLLAH, OFF JALAN PUDU, SECTION 52 AND 56, KUALA LUMPUR.
>
> We forward herewith the interim payment certificate No. 8 for the amount of one hundred and two thousand five hundred and twenty four and twenty four sen (RM$102,524.24) for payment. This constitutes the retention monies released for March 1997.
>
> This interim payment is based on the duly recommended assessment by the Quantity Surveyors.

Incidentally, it is pertinent to point out that the payment certificate number 8 was signed by the defendant. The latter simply adopted a lackadaisical attitude in its dealings with the plaintiff and refused to admit defeat in the face of overwhelming evidence. It was an attitude that should be deplored at all costs. There were no triable issues at all in the present appeal.

An argument was advanced for the defendant to the effect that the plaintiff had come to court with unclean hands. In rebuttal it was argued that equitable principles ought not to be considered in an O. 14 application. Only a court

of equity would refuse relief to a plaintiff whose conduct in the course of litigating the case has been improper. The maxim "he who has committed iniquity shall not have equity" would aptly apply to a varying fact situation. Thus, the courts in *Jones v. Lenthal* [1669] 1 Cas in Ch 154; and in *Small v. Brackley* [1707] 2 Vern 602 refused to grant relief to a plaintiff where the whole transaction revolved on the plaintiff's fraud or misrepresentation. In *Rich v. Sydenham* [1671] 1 Cas in Ch 202, the court was also reluctant to grant relief because the plaintiff had improperly obtained security and sought to enforce it in his favour. Relief was also refused in *Thomas v. Porter* [1668] 1 Cas in Ch 95 where there was wilful forfeiture. In *Nail v. Punter* [1832] 5 Sim 555, the court simply refused to grant relief where the plaintiff was instrumental for the breach of trust and in the course of which had derived benefit by obtaining some money. Basically when a plaintiff comes to the court of equity for relief, he must come with good conduct (*Harnett v. Yielding* [1805] 2 Sch & Lef 549 at 554) or with clean hands (*Cadman v. Horner* [1810] 18 Ves 10; and *Viscount Clermont v. Tasburgh* [1819] 1 Jac & W 112 at 121). Lord Mansfield CJ in *Fitzroy v. Gwillim* [1786] 1 Term Rep 153 observed that in an equitable action the plaintiff must "come with clean hands according to the principle that those who seek equity must do equity". Lord Cross of Chelsea in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 at 387, [1972] 2 All ER 492 at 507 relied on the "just and equitable" clause in s. 222(f) of the Companies Act 1948 and ruled that the petitioner in that case must come to court with clean hands. Lord Eldon LC in *Davis v. Duke of Marlborough* [1819] 2 Swan 108 at 157 aptly said:

> The principle of this court is not to give relief to those who will not do equity.

The word "equity" brings into the picture concepts of: fair play, fair and just, moral and ethical. Equity was administered by the English Court of Chancery and later under the English Judicature Act 1873. The learned author by the name of Herman, Ralph A. in his book entitled *"Equity and Law: A Comparative Study"* (New York, 1960) at p. 11 explained the word "equity" in this way:

> Equity in its substantive aspect consists essentially of a body of principles dealing with relief from hardship; principles which are of course merely a part of the larger concept of fairness and justice upon which all law is based. Early law, which is primarily concerned with rules designed for general application, allows little room for variation. In individual cases, relief from hardship emanates from an authority external to the law itself. Viewed at this stage of the evolution of law, equity corrects the law by applying, in circumstances where the ordinary rules would lead to unwarranted hardship, considerations of what is fair and just. In this sense equity constitutes a body of principles separate from the general rules it sometimes supplements or supercedes. As

> law advances haltingly toward humanitarian ideals it becomes concerned with the harshness of its effects in particular situations. Equitable solutions devised to meet the requirements of justice are received into the general law, and law and equity gradually coalesce. When the coalescence of the general rules and the corrective principles has become well advanced and the goals of law have become identified with the goals of equity, equity denotes consideration of what is fair and just which have helped to shape the general rules themselves, which therefore require no correction in order to bring about just results under all circumstances. Viewed at this stage of the evolution of law, equity is an integral part of a unitary legal system and becomes synonymous with justice.

Must I apply equitable principles to an application for summary judgment under O. 14 of the RHC? I have since perused through O. 14 of the RHC and I am constrained to answer the question posed in the negative. Order 14 r. 1 of the RHC is worded as follows:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

and it certainly excludes equitable principles from its framework. Even if I were to adopt equitable principles in adjudicating an application under O. 14 of the RHC, I have not lost sight of the fact that the plaintiff came to court with clean hands. *Ex turpi causa non oritur* action. I took solace in the wise words of advice of Brandeis J in *Loughran v. Loughran* [1934] 292 US 216 at 229 when his Lordship in style said:

> Equity does not demand that its suitors shall have led blameless lives.

Sir Nathan Wright L.K. in *Lord Dudley and Ward v. Lady Dudley* [1705] Prec. Ch. 241 at 244 added further solace when he said that:

> Equity therefore does not destroy the law, nor create it, but assist it.

The facts in the present appeal were very "clear and undisputed" and the documentary evidence was overwhelmingly strong in favour of the plaintiff. Not a single issue that was raised by the defendant was triable and it was the duty of this court to exercise its power under O. 14 in favour of the plaintiff. This meant that the appeal in encl. 22 ought to be dismissed with costs.

Next, it was argued for the defendant that although the rectification of the defective works had been completed according to the list of defective works as issued by the consultant yet the list did not stipulate a fixed date or time schedule for completion and the plaintiff too did not exhibit any document to

show that it had complied with the rectification of the defective works, and that being the case the certificate of practical completion by the consultant carried no weight at all and so, as the submission went, the defendant's appeal in encl. 22 should be allowed. With respect, these submissions were erroneous in the extreme and severely flawed for the following reasons:

(1) The plaintiff's claim was based on the final certificate dated 24 February 1997 that was issued by the consultant as reflected in the first three pages of exh. "JCS-3" of encl. 12 and the mutual agreement between the parties as alluded to earlier had been breached by the defendant when the latter failed to pay the monthly progressive payments from March 1997 right up to October 1997.

(2) The list of defective works during the defect liability period was issued by the consultant as contained in the certificate of practical completion. The plaintiff had successfully rectified all the defective works in accordance with the list of defective works on 28 May 1997. By letter dated 28 May 1997 from the plaintiff to the consultant, the plaintiff had explained that all the defective works had been rectified and this very letter had been exhibited as exh. "JCR-1" of encl. 17 and had been reproduced somewhere in this judgment.

(3) It was not a pre-condition to the issuance of the certificate of practical completion that rectification to the defective works must be completed first. As alluded to earlier, what the consultant had in mind was that practical completion was already achieved when the certificate of practical completion dated 11 October 1996 was issued (see the last three pages of exh. "JCS-2" of encl. 12). This fact too was supported by the consultant's letter dated 15 October 1996 (see the first page of exh. "JCS-2" of encl. 12). For fear of repetition it would also be ideal to emphasise that at the time of its issuance, the validity of the certificate of practical completion was not doubted by the defendant at all.

Seen in its proper perspective, the appeal in encl. 22 should be dismissed with costs.

An argument was advanced for the defendant in regard to the issue of the provision of performance guarantee. But this issue, according to the plaintiff, was an afterthought and it should not be considered by this court. It must be recalled that at the material time of the issuance of the certificate of practical completion, the defendant did not require the provision of the performance guarantee nor did the defendant ever raise the issue at all. The defendant would, in the circumstances of the case, be estopped from raising the issue at this point of time. When the consultant issued the certificate of practical

completion pursuant to its power under cl. 7.1 (b) of Annexure "A" to the written agreement, the defendant "remained silent" and did not utter a single word of whimper. Such was the conduct of the defendant in the face of the certificate of practical completion. A conduct which would trigger the estoppel doctrine into motion in favour of the plaintiff. Gopal Sri Ram JCA in *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611, lucidly explained the estoppel doctrine at p. 616 to p. 617 of the report in this way:

> Another way of stating the proposition is that a party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal.
>
> Viewed in this way, we perceive that the key to the whole case lies in the conduct of the appellant in this case. Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, frankly conceded that his client did indeed receive the statements of account of which we have earlier spoken. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability.
>
> But that is not what happened. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.
>
> When asked why his client had kept silent for a rather long period of time, Encik Darshan Singh's response was that his client was a large company and did not do anything until the letter before action was received. We trust that we will be forgiven if we are unable to detect the logic in this response.
>
> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
>
> To put it another way, the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.
>
> It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. See *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

> Having carefully read the judgment of the learned judge, we were unable to detect any error in reasoning in the way in which he approached the case. This is eminently a fit case for the exercise of the summary power to enter judgment.

and applying these passages to the factual matrix of the present appeal, I can safely say that the learned SAR had rightly decided in favour of the plaintiff in encl. 13. The present appeal was indeed an "eminent" case fit "for the exercise of the summary power to enter judgment". In short, encl. 22 should be dismissed with costs and the decision of the learned SAR be affirmed forthwith. In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 FC, Gopal Sri Ram JCA in style explained the estoppel doctrine in fine legalistic words. This was what his Lordship said at p. 295 of the report:

> We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p. 108:
>
> > Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.
>
> It is also wrong to think the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey* and the *Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.
>
> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case ([1982] 1 QB 84 at p. 122; [1981] 3 All ER 577 at p. 584; [1981] 3 WLR 565 at p. 575) as follows:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments; proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can

> now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistakes makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.* (emphasis added)

Later at p. 296 of the report, his Lordship Gopal Sri Ram JCA tersely said:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v. Alt* [1878] 8 Ch D 286 at p. 314:
>
> > If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

According to Lord Denning MR in *Moorgate Mercantile Co Ltd v. Twitchings* [1975] 3 All ER 314 at 323, [1975] 3 WLR 286 at 296: "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity." The conduct of the defendant in remaining silent upon receipt of the certificate of practical completion as issued by the consultant must be construed adversely against the defendant. The defendant's silence was a conduct detrimental to the defendant. This was indeed a case of total silence or inactivity even when the defendant had a duty to speak or to act accordingly (*Hopgood v. Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223).

Undaunted, the defendant relied on the case of *Lec Contractors (M) Sdn Bhd (dahulunya dikenali sebagai Lotteworld Engineering & Construction Sdn Bhd) v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473 CA to bolster up its argument in regard to the issue of the provision of performance guarantee. But with respect, that case dealt with performance bond in the form of a bank guarantee or commonly known as "on demand" bond which is normally deposited with the employer at the commencement of a building contract in order to ensure the performance of the construction works by the contractor. Whereas, in the present appeal, cl. 23 of Annexure "A" to the written agreement spoke of performance guarantee in the form of a warranty by the plaintiff for possible defects of completed works. Factually, that case certainly has no relevance to the facts of the present appeal.

Reverting back to the retention sum of RM1,230,290.91 that was due and owing to the plaintiff, I must categorically say that it was a debt owing which the defendant must pay. Peh Swee Chin J (as he then was) treated the retention sum in the case of *Lee Kam Chun v. Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, Garnishee)* [1988] 1 CLJ 52, 56 in this way:

> In my judgment, the retention sum in this case is an existing debt and in fact an existing indebted sum that involves the payment, notionally and irresistibly pursuant to an interim certificate issued by the architect, by the garnishee to the judgment-debtor and the latter's payment in turn back to the garnishee for retention for purposes already stated, with the garnishee holding the money as trustee for the judgment debtor. A debt in respect of such money began to exist in the circumstances and still does exist, and to contend otherwise would be to defy common sense and logic.

Continuing further at p. 57, his Lordship said:

> Although clause 30(4)(b) and (c) provide for even two certificates of the architect to be issued before the retention sum would be refunded to the judgment-debtor, such retention sum could still be attached before the issue of such certificates, for they provide for deferred payment only, mentioned by me earlier, as security for making good any defective work, in no way impairing the nature of the retention sum as an existing debt with deferred payment.

and I respectfully adopt the views of his Lordship to the factual matrix of the present appeal.

Next, the defendant argued that pursuant to cl. 23 of the Annexure "A" to the written agreement the defendant was entitled to deduct the monies that were due to the plaintiff for liquidated and ascertained damages ("LAD") as well as the costs of rectification of the defective works. But a perusal of cl. 23 of the Annexure "A" to the written agreement would prove the falsity of the defendant's arguments. For convenience, cl. 23 of Annexure "A" to the written argument must be reproduced and it was worded in this way:

> Without limiting the warranties contained in Clause 3.2 hereof, the Builder further warrants the performance of the Works for the period specified in Annexure B after the issue of the Certificate of Practical Completion in accordance with the Contract Documents to the standard and condition required by the Contract Documents and agrees to provide a Performance Guarantee on terms and conditions wholly satisfactory to the Proprietor commencing on the Date of Practical Completion and effective for the period specified in Annexure B.

> If during this period any defects become apparent and the defects are due to any cause including design, workmanship, materials or maintenance the contractor shall remedy the defects when directed to do so by the Proprietor, who shall state in that direction in what respects the Works are defective and the dates for which the rectification shall be completed. Should the Contractor fail to remedy such defects the Proprietor may do so and recover the costs and expenses of the same together with any consequential loss or damage from the Builder.

and it in fact meant that in the event that the plaintiff failed to rectify during the warranty period the defendant may do so and recover the costs and expenses from the plaintiff. In my considered view, cl. 23 of Annexure "A" to the written agreement was not the relevant clause to construe the LAD and that clause certainly did not provide for the contractual right of the defendant to retain monies that was due and owing to the plaintiff. Clause 23 of Annexure "A" to the written agreement too did not provide for the deduction of any sort; that clause was more of warranty clause which allow the defendant to recover or claim against the plaintiff for the actual costs of rectification.

In my judgment, cl. 12.5 of Annexure "A" of the written agreement pertains to LAD and that clause allows for the deduction of LAD calculated at practical completion. It would be interesting to note that the agreed LAD of RM600,000 was already deducted from the balance owing to the plaintiff pursuant to the mutual agreement at the meeting that took place on 31 January 1997 which confirmed practical completion and concluded with the subsequent issuance of the final certificate dated 24 February 1997. Incidentally, the final certificate couched as the statement of final account was exhibited and marked as exh. "JCS-3" of encl. 12 and it was worded in this way:

STATEMENT OF FINAL ACCOUNT

			Date: 24/2/97
1.	CONTRACT SUM		RM15,125,142.00
2.	VARIATION WORKS		RM 1,278,736.86

3.	ADJUSTED CONTRACT SUM		RM16,403,878.86
			==========
4.	**DEDUCTION**		
4.1	Amount Previously Paid in Interim Certificate No. 1-7	RM14,568,562.95	
4.2	Liquidated & Ascertained Damage(s)	RM 600,000.00	
4.3	Debit Note	RM 5,025.00	RM15,173,587.95
		----------	----------
			RM 1,230,290.91
			==========

and it clearly showed beyond per adventure that the agreed LAD of RM600,000 had been deducted, leaving only the sum of RM1,230,290.91 as due and owing to the plaintiff.

Going on an uphill task, the defendant submitted that the certificate issued by the consultant was not final and conclusive. The defendant submitted that it claimed for defective works amounting to RM825,600 and the LAD in the sum of RM600,000. As I understood it, the defendant was saying that the sum of RM825,600 was for defective works which came under Item 'B' under the heading: "Supply of labour, equipment and machinery for hacking of excessive overcasted barrette piles" as seen in exh. "C" of encl. 14, but alas, this item was not within the scope of the plaintiff's works and obviously it was not defective works as alleged. The plaintiff too had by its affidavit in reply in encl. 17 of paras 17 and 18 denied categorically these defective works. I have earlier explained that "Hacking top of barrette piles" did not come within the scope of the plaintiff's works and I must put on record that the defendant was making wild allegations without any basis whatsoever. In regard to the LAD of RM600,000 which was raised once again by the defendant, I have nothing to add except to say that the final certificate had taken that sum into consideration. This was my judgment and I so hold accordingly.

In desperation, the defendant submitted that in the event of a dispute the plaintiff "ought to raise the matter as to calculation with the common architect and quantity surveyors whom the plaintiff and defendant have hitherto mutually appointed". But with respect, this was a baseless submission devoid of any merit. It must be emphasised that there never was any mutually appointed common architect and quantity surveyors. In fact, all the architects, quantity surveyors including the consultant were hired by the defendant.

The fact of the matter was this. The final certificate dated 24 February 1997 as reproduced earlier was issued by the consultant after the mutual agreement of both the parties at the meeting on 31 January 1997. In my judgment, once the final certificate was issued, the contract between the parties came to an end – it must be treated as completed. It must be emphasised that the final certificate as demonstrated somewhere in this judgment was final and conclusive and it cannot be challenged by anyone – not even by the consultant. This was my judgment and I so hold accordingly.

Conclusion

The sum of RM1,230,290.91 as a debt was undisputed. It was a debt that was due and payable by October 1997 and this was never denied by the defendant. There was a blatant failure on the part of the defendant to show any contractual basis or consent of the plaintiff to retain that sum beyond 1997.

The defendant must be held accountable. For the varied reasons as alluded to in this judgment, the appeal in encl. 22 must be dismissed with costs. The decision of the learned SAR in regard to encl. 13 must be affirmed forthwith. Just like Lord Justice Lawton in the case of *Ellis Mechanical Services Ltd v. Wates Construction Ltd (supra)*, I too adopted a robust approach to construe the O. 14 application in favour of the plaintiff. It was pointless to delay the matter any further.